

Amended Complaint for Failure to State a Claim pursuant to Federal Rules of Civil Procedure 12(b)(6).

ARGUMENT

As described by Plaintiff in its Opposition to New Defendants’ Joint Motion to Dismiss (Docket No. 150), the New Defendants, in their Motion to Dismiss, adopted and incorporated by reference the arguments and legal support contained in the Motion to Dismiss Plaintiff’s Amended Complaint for Failure to State a Claim (Docket No. 76) and Reply in Support of Defendants’ Motion to Dismiss (Docket No. 128) filed by Defendants AT&T Mobility, LLC, Barnes & Noble, Inc., J.C. Penney Company, Inc., Sally Beauty Holdings, Inc., and Home Depot U.S.A., Inc. (collectively the “Original Defendants”). Likewise, Plaintiff, in its Opposition, adopted and incorporated by reference the arguments and legal support contained in its Response in Opposition to the Original Defendants’ Joint Motion to Dismiss (Docket No. 121) and its Sur-reply in Opposition to the Original Defendants’ Joint Motion to Dismiss (Docket No. 129). This reply, therefore, will focus on the arguments presented in the Plaintiff’s Sur-reply in Opposition to the Original Defendants’ Joint Motion to Dismiss (Docket No. 129), as they are the only arguments to which neither the Original Defendants nor the New Defendants have already responded.

A. USEI Is Wrong When It States that *Landmark Tech.* Does Not Support Defendants’ Position

USEI misinterprets *Landmark Tech.* when it claims that the complaint in that case was rejected only because the phrase “products and services using electronic commerce systems” was too vague in a way that “laptop computers and point-of-sale systems” is not. In fact, Judge Davis rejected Landmark’s complaint not simply for insufficiently precise wording, but because it “fails to inform [the defendant] as to what it must defend.” The Court continued that it “has high

expectations of a plaintiff's preparedness before it brings suit," and finally said that the Court "expects that [plaintiff] already has sufficient knowledge of facts that it can include in its complaint that would give [defendant] sufficient notice of the claims alleged against it." *Landmark Tech. LLC v. Aeropostale*, Civ. No. 6:09-CV-262, Mem. Op. and Order, Dkt. No. 122, at 6 (E.D. Tex. Mar. 29, 2010). This is precisely the same problem as in the instant case: the complaint is entirely unclear, and the defendants have no notice of the claims alleged against them, which claims apply to which defendants, or how they have allegedly infringed.

B. USEI's Informal Request for Information Is Relevant

Landmark Tech. also demonstrates the relevance of USEI's informal letter request for information sent to all defendants. Specifically, it highlights USEI's insufficient preparedness before bringing suit. USEI does not know the "facts that it can include in its complaint to give the defendants sufficient notice of the claims alleged," or else it would not need to ask the defendants to identify the computer hardware they own. *Landmark* at 6. USEI should already at least have *some* idea which products each defendant owns that it claims infringe its patents, instead of suing first and then looking to figure the details out through subsequent requests for information.

C. USEI's Reliance on *Tune Hunter* and *Eolas* Is Misplaced

While it is true that *Tune Hunter* was a multi-defendant case, and *Eolas* was a multi-patent case, that is not sufficient to make their circumstances equivalent to those in the present case. USEI claims that the defendants are asking for a heightened pleading standard, but that too is incorrect. The defendants are entitled to the same pleading standard as in *Tune Hunter*, *Eolas*, and *Landmark Tech.*: "sufficient notice of the claims alleged against" them. In *Tune Hunter* and *Eolas*, that standard was satisfied, even though there may have been more than one patent or more than one defendant, because the pleadings were clear. In this case, due partly to the large

number of defendants, patents, and claims, but mostly to the single vague paragraph claiming infringement in the most general possible terms, USEI has not met the pleading standard.

CONCLUSION

As the foregoing demonstrates, USEI's Amended Complaint fails to meet the basic pleading standard because it does not give the defendants sufficient notice of the claims alleged against them. We ask that the Court dismiss the complaint in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 19th day of August, 2010.

/s/ Melvin R. Wilcox

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